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The WTO Outlaws the Privileges of the Chinese Payment Services Giant

By Panagiotis Delimatsis



Introduction

On August 31, 2012, in the absence of an appeal, the WTO's Dispute Settlement Body adopted the Panel Report in *China—Electronic Payment Services*.^[1] In a long-awaited decision, the Panel upheld certain claims brought by the United States under the General Agreement on Trade in Services ("GATS")^[2] against a

series of Chinese measures^[3] imposed on suppliers of electronic payment services ("EPS").^[4]

Benefiting from these measures, the Chinese EPS supplier, China UnionPay Co., Ltd ("CUP"), has built a unique position in the Chinese EPS market, recently becoming the third biggest EPS network globally, along with Visa and MasterCard, and supplanting American Express. With EPS transactions processed in China accounting for over \$1 trillion,^[5] restoring fair competition in the Chinese payment market (and access to more than one billion customers) was of particular importance for the major American EPS suppliers. China, on the other hand, argued emphatically that its measures aim to establish the first national inter-bank network for Renminbi ("RMB") payment card transactions, relying on uniform technical and commercial standards.

The United States may claim overall victory, as the Panel found that certain Chinese measures violated its GATS obligations by restricting foreign EPS suppliers from providing domestic RMB payment card transactions in China under conditions similar to CUP. The Panel examined a series of Chinese measures requiring that: 1) payment cards issued in China bear the CUP logo and issuers comply with technical standards imposed by CUP (*issuer requirements*);^[6] 2) all ATMs, merchant card processing equipment, and POS terminals in China accept CUP cards (*terminal equipment requirements*); 3) acquiring institutions post the CUP logo, become members of the CUP network, and accept all payment cards with the CUP logo (*acquirer requirements*); and 4) CUP alone be responsible for the clearing of certain RMB bank card transactions in China, Macao, and Hong Kong (*Hong Kong/Macao requirements*). The Panel agreed with the United States that these requirements accord more favorable treatment to CUP, violating China's national

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treatment obligations.[7] The Panel found that China did not violate its market access obligations,[8] as China undertook no market access commitments in its Schedule of Specific Commitments (“Unbound” in GATS parlance), with one exception: Whereas China had promised to provide full market access for EPS suppliers established in the Chinese market, the Hong Kong/Macao requirements gave CUP monopoly power to conduct the relevant transactions.[9]

Despite being one of the three main pillars of the WTO system, case law under GATS remains scarce. This decision is therefore a welcome development in an underdeveloped area of WTO case law, demonstrating the “bite” of GATS in opening services markets globally. Crucially, this is also the first case to interpret provisions of the Financial Services Annex (“FSA”).[10]

The Significance of GATS Schedules of Specific Commitments

Compared to the other WTO Agreements, GATS is a flexible contract whereby the main liberalizing provisions—that is, the obligation to accord national treatment under GATS Article XVII and the elimination of limitations on market access under GATS Article XVI—apply only if a Member decides to open a given sector (e.g., financial services) or subsector (e.g., payment services) by inscribing a commitment in its Schedule. As GATS defines services through the identification of four modes of supply,[11] any limitations to the commitments made are classified per mode of supply.[12] For instance, in Figure 1 below, a Member would be obliged to fully liberalize the provision of legal services through commercial presence of foreign suppliers (with “(3) None” indicating no limitations on market access or national treatment in Mode 3), but it would retain the power to impose any limitations on the cross-border supply of legal services (with “(1) Unbound” indicating no liberalization on market access or national treatment in mode 1).

Figure 1: A simplified Schedule of Specific Commitments Under GATS

Sector	Limitations on Market Access	Limitations on National Treatment
Legal Services	(1) Unbound (2) None (3) None (4) Unbound	(1) Unbound (2) None (3) None (4) None

Thus, a Member’s Schedule determines the applicability of key GATS rules to that Member. When inscribing a sector in its Schedule, a Member typically qualifies the access granted to its domestic market or lists limitations on national treatment. Sometimes, as in this case, interpretation of a Schedule becomes more difficult because of the unique terms used by a Member. Pursuant to GATS Article XX:3, Schedules form an integral part of the GATS; the customary rules of interpretation of the Vienna Convention on the Law of the Treaties therefore apply.

This decision underscores the significance of WTO Members carefully entering concessions in their GATS Schedules. In earlier GATS cases, WTO adjudicators rejected assertions by China[13] and the United States[14] as to the true ambit of their Schedules. In this case, however, China partly succeeded in establishing that the scope of its commitments was

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narrower than that suggested by the complainant.

Electronic Payment Services: The Panel's Findings Relating to the Sector and the Measures at Issue

As a threshold issue, the Panel determined that EPS for payment card transactions is an integrated service, despite possible disaggregation.^[15] The Panel went on to interpret the scope of subsector 7.B(d) of China's Schedule, headed "Banking and Other Financial Services." Following the analytical method used in *US—Gambling*, the Panel found that all services that are essential to the processing and completion of transactions using payment cards are "payment and money transmission services" within the meaning of China's Schedule,^[16] including EPS.

The Panel agreed with the United States that the four sets of requirements described above create a unique position for CUP in the Chinese EPS market. With respect to the Hong Kong/Macao requirements, the Panel regarded CUP as the monopoly EPS supplier regarding the relevant transactions.^[17] However, the Panel dismissed the United States' claim that the measures at issue, alone or in combination, establish CUP as the sole supplier of EPS for *all* domestic transactions denominated and paid in RMB.^[18] In addition, the Panel found no broad prohibitions on the use of non-CUP cards for cross-region or inter-bank transactions.^[19] The Panel suggested that additional evidence—such as economic analyses of profitability, price-cost margins, or demand elasticity—or evidence relating to the conduct of CUP could have helped the United States to substantiate its claims.

Market Access and National Treatment Under GATS

Limitations on Market Access to EPS in China

In this case, China clearly inscribed in its Schedule^[20] the sub-sector "all payment and money transmission services" as described in the GATS Financial Services Annex.^[21] Less clear was the *scope* of the market access commitment, as China argued that it had inscribed no liberalizing commitments ("Unbound") for EPS under the market access column of its commitments for cross-border supply (mode 1) and commercial presence (mode 3). After thorough analysis, the Panel concluded that China made no market access commitments to liberalize cross-border supply of EPS, and thus it could restrict such supply.

Nevertheless, the Panel found that China undertook market access commitments to liberalize commercial presence (mode 3) for "foreign financial institutions." In China's view, EPS suppliers fall outside this category of financial service suppliers. Absent any definition of foreign financial institutions in China's Schedule, GATS, or the FSA, the Panel examined the ordinary meaning and context of the term to conclude that a foreign financial institution is any foreign institution providing financial services classified under subsectors (a) to (f) of China's Schedule, including foreign EPS suppliers (i.e., non-bank financial institutions). In the Panel's view, the only reasonable meaning of China's mode 3 commitment was that all foreign financial institutions established in China, including foreign EPS suppliers, would have unfettered access to engage in local currency business with all Chinese enterprises and natural persons, subject to certain qualifications described in China's Schedule.^[22]

Having established the scope of the market access commitment, the Panel went on to examine whether the four requirements fall within that scope. The Panel found that the first

three requirements (the issuer, acquirer, and terminal requirements) do not limit the number of service suppliers within the meaning of GATS Article XVI:2(a)d,[23] under modes 1 and 3. However, the Panel found that the Hong Kong/Macao requirements constitute a limitation on the number of EPS suppliers in violation of China's mode 3 commitments, as they establish a monopoly on the processing of RMB bank card transactions for the CUP, contrary to GATS Art. XVI:2(a).[24]

Discriminatory Treatment to the Detriment of Foreign EPS Suppliers

Turning to the national treatment claim, the Panel first addressed the scope of China's commitments under mode 1 (cross-border supply). A systemic issue arises when a Member inscribes (as did China in this case) no liberalizing commitments ("Unbound") under the market access column of its Schedule, but promises equal treatment ("None") under the national treatment column.[25] The Panel referred to GATS Article XX:2, which states:

Measures inconsistent with both Articles XVI [market access] and XVII [national treatment] shall be inscribed in the column relating to Article XVI. In this case the inscription will be considered to provide a condition or qualification to Article XVII as well.

That Panel indicated that the GATS drafters did not intend to create a hierarchy between GATS Articles XVI and XVII; rather, Article XX:2 is a *scheduling* guideline.[26] Nevertheless, the Panel relied on this provision to find that an "Unbound" inscription under the market access column can only be interpreted as limiting the scope of a promise of national treatment. Thus, the Panel concluded that, despite inscribing "None" under the national treatment column of its Schedule, China's "Unbound" market access entry means China is free to maintain the full range of limitations set out in Article XVI:2 for mode 1, even if they are discriminatory.

Accordingly, the Panel found that the Hong Kong/Macao requirements are consistent with China's national treatment commitments under mode 1 due to the "Unbound" inscription under the market access column. However, the Panel suggested that the "Unbound" inscription does not cover the other three requirements because the Panel had earlier found that they do not come within the ambit of GATS Article XVI:2(a). Therefore, the Panel proceeded to examine whether these three requirements come under the national treatment obligation. The Panel found that they are measures affecting the supply of services pursuant to GATS Article XVII and provide less favorable treatment to like service suppliers of foreign origin. Thus, the Panel agreed with the United States that the issuer, terminal, and acquirer requirements, by establishing a privileged position for CUP within the Chinese EPS market to the exclusion of foreign EPS suppliers, accord less favorable treatment to foreign EPS suppliers in contravention of the Chinese national treatment commitments under modes 1 and 3.

Conclusion

This case follows landmark decisions on the scope of GATS in *US—Gambling and China—Publications and Audiovisual Products* and is expected to further open China's financial services market, benefiting American EPS suppliers in particular. Nevertheless, China will likely have several months to implement the Panel ruling. The Panel decision offered additional clarifications for the interpretation of Members' Schedules of Specific

Commitments under GATS. More importantly, as this case was not appealed, the Panel Report represents the only WTO dispute settlement ruling on the overlap in a Schedule of an “Unbound” commitment (i.e., no liberalization) and a “None” commitment (i.e., full liberalization). The case confirms that the flexibility attributed to Members in drafting GATS Schedules can be a double-edged sword. At present, no clear solution exists to ensure predictability and security in the interpretation of GATS Schedules.

About the Author:

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Endnotes:

[1] Panel Report, *China—Certain Measures Affecting Electronic Payment Services*, WT/DS413/R (July 16, 2012), available at http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds413_e.htm [hereinafter Panel Report, *China—Electronic Payment Services*].

[2] General Agreement on Trade in Services, available at http://www.wto.org/english/docs_e/legal_e/26-gats_01_e.htm.

[3] Panel Report, *China—Electronic Payment Services*, *supra* note 1, ¶ 7.209.

[4] Electronic payment services are defined as services through which transactions involving payment cards are processed and through which transfers of funds between institutions participating in the transactions are managed and facilitated: Panel Report, *China – Electronic Payment Services*, *supra* note 1, ¶ 7.25.

[5] See U.S. Trade Rep. [USTR], *United States Wins Dispute Over China’s Discrimination Against U.S. Financial Services Companies* (Aug. 31, 2012), available at www.insidetrade.com.

[6] CUP’s logo is also the symbol used to represent China’s interbank bank card network, referred to by the Panel as the Yin Lian/UnionPay logo.

[7] GATS Article XVII requires that foreign service suppliers of like services are treated no less favourably than domestic service suppliers unless a Member reserved discriminatory measures of this type in its Schedule.

[8] GATS Article XVI prohibits the imposition of certain limitations of predominantly quantitative nature such as those relating to the number of suppliers (e.g., monopolies), the total number of service operations, or the total value of service transactions. Such limitations are prohibited if the relevant Member undertook commitments in a given sector and did not inscribe these limitations in its GATS Schedule.

[9] Panel Report, *China—Electronic Payment Services*, *supra* note 1, ¶ 7.383.

[10] Financial Services Annex, available at http://www.wto.org/english/docs_e/legal_e/26-gats_02_e.htm#annfin.

[11] The four modes of supply are: cross-border supply – mode 1 (where no movement of the service supplier occurs); consumption abroad – mode 2 (where the service recipient moves to receive the service); commercial presence (where the service supplier establishes itself in the territory of another Member); and temporary movement of natural persons (where the service supplier moves temporarily to deliver a service in the territory of another Member).

[12] For more technical details, see WTO, Guidelines for the Scheduling of Specific Commitments Under the GATS, S/L/92 (Mar. 28, 2001).

[13] Appellate Body Report, *China—Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WT/DS363/AB/R (Dec. 21, 2009).

[14] Appellate Body Report, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/AB/R (Apr. 7, 2005) [hereinafter Appellate Body Report, *US—Gambling*].

[15] Panel Report, *China—Electronic Payment Services*, *supra* note 1, ¶ 7.59.

[16] *Id.* ¶¶ 7.201–2.

[17] *Id.* ¶ 7.383.

[18] *Id.* ¶ 7.507.

[19] *Id.*

[20] See China's Schedule of Specific Commitments, *available at* <http://tsdb.wto.org/default.aspx>.

[21] Financial Services Annex, *supra* note 10, art. 5(a)(viii).

[22] Section C of the relevant mode 3 market access entry under the sector 7.B of China's Schedule.

[23] See also Appellate Body Report, *US—Gambling*, *supra* note 14, ¶ 232.

[24] Panel Report, *China—Electronic Payment Services*, *supra* note 1, ¶ 7.623.

[25] See Panagiotis Delimatsis, *International Trade in Services and Domestic Regulations – Necessity, Transparency, and Regulatory Diversity* 141 ff. (2007).

[26] Panel Report, *China—Electronic Payment Services*, *supra* note 1, ¶ 7.664.